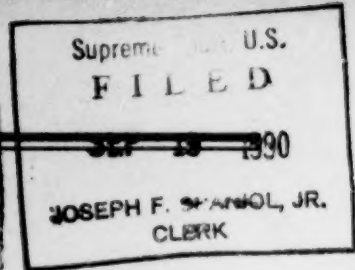


③
No. 90-319



IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

PHYLLIS ZAGANO,

Petitioner,

—v.—

FORDHAM UNIVERSITY and GEORGE N. GORDON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether it was an abuse of discretion to deny a motion to dismiss without prejudice on the day of trial when (a) the motion was untimely, (b) substantial prejudice would have resulted from allowing an eleventh-hour abandonment of the case, (c) the interests of justice could best be served by resolving the controversy in federal court, and (d) the evidence of dilatoriness, bad faith, and vexatiousness on the part of the movant was considerable.

2. Whether it was an abuse of discretion to dismiss an action with prejudice when the plaintiff refused to go forward at trial in federal court on the day set for trial or on any future day.

PARTIES TO THE PROCEEDINGS

All parties to this proceeding are identified in the caption.*

* In accordance with Rule 29.1 of this Court, respondent Fordham University states that it has no parent companies or subsidiaries.

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—v.—

FORDHAM UNIVERSITY and GEORGE N. GORDON,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Fordham University and George N. Gordon oppose granting the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit entered in this case on March 29, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (Winter, J., joined by Cardamone and Altimari, JJ.) is reported at 900 F.2d 12 (2d Cir. 1990). The per curiam opinion of the Court of Appeals for the Second Circuit, denying petitioner's petition for rehearing with suggestion for rehearing en banc, is reported at 900 F.2d 15 (2d Cir. 1990). The oral decision of the District Court for the Southern District of New York, denying petitioner's motion to dismiss without prejudice on the day of trial and granting respondents' subse-

quent motion to dismiss with prejudice after petitioner refused to proceed to trial, is unreported. The opinion of the District Court for the Southern District of New York, granting respondents' motion to enjoin further litigation in another forum of issues previously dismissed on the merits in the federal court, is reported at 720 F. Supp. 266 (S.D.N.Y. 1989).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit sought to be reviewed was entered on March 29, 1990. A per curiam opinion, denying a petition for rehearing with suggestion for rehearing en banc, was entered May 18, 1990. Discretionary jurisdiction to review the judgment of the court of appeals rests on 28 U.S.C. § 1254(1).

RULES OF PROCEDURE INVOLVED

The questions presented for review involve Fed. R. Civ. P. 41(a)(2) and Fed. R. Civ. P. 41(b).

Fed. R. Civ. P. 41(a)(2) provides, in relevant part:

Except as provided in paragraph (1) of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Fed. R. Civ. P. 41(b) provides, in relevant part:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for ~~dismissal~~ dismissal of an action or of any claim against the defendant. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for

improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF THE CASE

This is the Title VII case of an embittered university professor who abused the litigation process to advance her own vindictive ends and now seeks to have the Court relieve her of the inevitable consequences of her actions. It involves exclusively procedural issues under Fed. R. Civ. P. 41. The trial scheduled in the case never occurred because petitioner, Phyllis Zagano, refused to go to trial on the appointed day or on any future day, voluntarily eschewing the opportunity for a full airing of her claims in federal court.

A. The District Court Decisions

A series of three decisions by Judge Richard Owen of the District Court for the Southern District of New York provides the subject matter for the present petition.

1. Denial of Motion to Dismiss Without Prejudice

Eight days before the trial of her Title VII claims was set to begin, Zagano served a motion under Fed. R. Civ. P. 41(a)(2) for voluntary dismissal of the action, without prejudice. The motion was made more than four years after the commencement of the lawsuit and seven full weeks after the case had been scheduled for trial. Zagano argued that, due to the advanced age and claimed inexperience of the Reid & Priest litigator handling her case, she should be permitted to drop her federal action on the eve of trial in order to pursue her claims before the New York State Division of Human Rights ("SDHR") where "the rules of evidence and degree of proof are less rigorous."

Taking up the fully briefed motion as the first order of business on the day of the trial, the district court concluded, after extensive oral argument and a recess to re-read the papers, that "There are a number of, in my opinion, good

reasons to deny it, and I cannot really think of any reasons to grant it." (A2a).¹

More specifically, the district court noted that Zagano's motion was not diligently made and came much too late; that respondents had already been put to enormous expense in preparing for trial; that the case was ready for trial; that there was an increasing risk of lost testimony due to the unavailability, illness, or death of witnesses; that, unlike the SDHR which was found to be "a tortoise in resolving these things," the federal court was "ready, willing and able in March 1989 to decide these issues"; and that the lawsuit had "turned into an instrument of vexation in the hands of the plaintiff" and "the University was being horsed around by the plaintiff." (A2a-4a). Based upon its recitation of the numerous compelling reasons for refusing to permit an eleventh-hour dismissal without prejudice, the district court denied Zagano's Rule 41(a)(2) motion.

2. Granting Motion to Dismiss With Prejudice

After denying Zagano's motion for voluntary discontinuance, the district court proceeded to the trial of the case which had been scheduled to begin that day. Zagano's counsel resisted the district court's instruction to call his first witness and indicated unequivocally that Zagano would not go forward with a trial on the merits of her claims in federal court on that day or on any other day.

In view of Zagano's refusal to proceed with the trial, the district court entertained and granted respondents' motion under Fed. R. Civ. P. 41(b) for dismissal of the action with prejudice and on the merits. (A4a).

3. Enjoining Further Litigation at the SDHR

Shortly after entry of the judgment dismissing Zagano's Title VII action with prejudice and on the merits, respon-

¹ Parenthetical references are to the Appendix to Zagano's Petition for Writ of Certiorari.

dents moved before the SDHR to dismiss Zagano's administrative charges on the basis of *res judicata*. When the SDHR deferred ruling on the motion until a hearing on the merits of Zagano's claims had been completed, respondents returned to the district court for an injunction rather than face the prospect of prolonged further litigation before the SDHR of issues they believed had been finally resolved. Respondents moved under the All Writs Act, 28 U.S.C. § 1651(a) (1983), for an order enjoining Zagano from further prosecuting either of her two pending SDHR charges and enjoining the SDHR from conducting any further proceedings with respect to either of the charges.

In an opinion, dated July 27, 1989, the district court granted respondents' motion on the grounds that an injunction against further litigation of Zagano's SDHR claims was necessary to effectuate the earlier federal dismissal order and that respondents would suffer irreparable harm if proceedings before the SDHR were permitted to continue. *Zagano*, 720 F. Supp. at 267-68. (A9a-10a).

B. The Court of Appeals Decision

On appeal, the Court of Appeals for the Second Circuit found that there had been no abuse of discretion in the district court's actions with respect to either Zagano's motion to dismiss without prejudice or respondents' motion to dismiss with prejudice.

With respect to Zagano's motion to dismiss without prejudice, the Second Circuit agreed with the district court that the circumstances "amply justified" denial of the motion under Fed. R. Civ. P. 41(a)(2). The court of appeals emphasized that the motion was made "far too late"; that granting the motion would prejudice respondents because of the resources they had spent preparing for trial; that the likelihood of additional, substantial delays in the SDHR proceedings might result in further loss of pertinent testimony through illness or death; that Zagano's reasons for requesting dismissal were inadequate; that there was no need to give priority to the

pending state administrative proceeding because the case presented no difficult questions of state law best resolved in a state tribunal; and that Zagano had used the case as an "instrument of vexation" against respondents. *Zagano*, 900 F.2d at 14-15. (A17a-19a).

Concerning respondents' motion to dismiss with prejudice after Zagano failed to go forward at trial, the court of appeals held that "[i]t is beyond dispute that a district court may dismiss a case under Rule 41(b) when the plaintiff refuses to go forward with a properly scheduled trial." *Zagano*, 900 F.2d at 14 (A15a). The Second Circuit also rejected Zagano's characterization of the dismissal of her federal action as a summary and unexpected response to her motion to dismiss, pointing out that the dismissal occurred in response to a motion made by respondents only after Zagano herself chose not to comply with a court order to go to trial. *Zagano*, 900 F.2d at 15 (A19a).

Although Zagano also appealed from the district court's order enjoining further litigation of Zagano's claims before the SDHR, the Second Circuit did not reach the merits of the injunction. In her appellate brief, Zagano had not undertaken to challenge the propriety of the district court's issuance of the injunction, but rather had simply argued that the propriety of the injunction depended upon the propriety of the dismissal with prejudice. Moreover, in response to a query at oral argument intended to explore Zagano's position with respect to the injunction, Zagano's counsel confirmed the view that "if the dismissal with prejudice is affirmed, then as a practical matter the case dies." Consequently, since the court of appeals upheld the dismissal with prejudice, it saw no need to address the injunction. *Zagano*, 900 F.2d at 13-14 n.1. (A15a).

C. The Court of Appeals Per Curiam Opinion

Zagano filed a petition for rehearing with suggestion for rehearing en banc. The court of appeals took the unusual step of denying the motion in a per curiam opinion. The

court felt compelled to do so because Zagano's petition advanced a legal argument which had been "expressly waived" and contained "unfair and unfounded attacks" on her trial counsel from Reid & Priest. *Zagano*, 900 F.2d 15. (A21a).

The court of appeals reiterated the basis upon which it had refrained from passing upon the merits of the district court's injunction:

We declined to consider the propriety of the injunction because the NYSDHR filed no appeal and appellant's main brief stated that so far as her interest in the injunction was concerned, "the propriety *vel non* of the injunction depends on the propriety of the district court's dismissal of the action with prejudice." Brief of Plaintiff-Appellant at 44. Further, at oral argument, we made an express inquiry as to Zagano's position on the injunction, and counsel for Zagano stated, "My point there is that if the dismissal with prejudice is affirmed, then as a practical matter the case dies. . . ." Because we affirmed the dismissal with prejudice, we accepted counsel's invitation to regard the provisions of the injunction as a moot issue.

Zagano, 900 F.2d 15. (A21a).

The Second Circuit also stressed again that Zagano's case had been dismissed with prejudice not because her attorney failed to request an adjournment of the trial or because the district court refused to grant one, but because of Zagano's own unequivocal decision not to go to trial in federal court "at any time in this action." *Zagano*, 900 F.2d 15. (A21a-22a).

REASONS FOR DENYING THE WRIT

I

THE QUESTIONS PRESENTED FOR REVIEW IN THE PETITION ARE NOT RAISED BY THE DECISION BELOW

Neither of the questions presented for review in Zagano's petition are raised by the decision below. Indeed, the first question which Zagano urges the Court to consider, concerning the district court's injunction against further litigation before the SDHR, is one which the court of appeals advertently did not reach because it had been "expressly waived" by Zagano, first in her brief on appeal and again at oral argument. *Zagano*, 900 F.2d 15. (A21a). *See also Zagano*, 900 F.2d at 13-14 n.1. (A15a). The court of appeals "accepted counsel's invitation to regard the provisions of the injunction as a moot issue." *Zagano*, 900 F.2d 15. (A21a).

It would be inappropriate for the propriety of the injunction to be reviewed for the first time in this Court. Moreover, Zagano has relinquished her right to challenge the injunction by failing to have done so before the court of appeals.

The second question presented by Zagano for review is one which the court of appeals did not decide because it is not raised by the facts of record. Zagano asks this Court to consider whether it is proper to dismiss an action on the merits without a trial in response to a motion for voluntary dismissal. Indisputably, however, no such action was taken in this case. When Zagano attempted to raise the same question in the proceedings below, the Second Circuit set her straight in definitive terms:

Zagano mischaracterizes the dismissal of her federal action as a summary and unexpected response to her motion to dismiss without prejudice, implying that she was not provided notice of the court's intention to convert her motion into a dismissal with prejudice. *See Gravan v. Columbia Univ.*, 845 F.2d 54 (2d Cir. 1988).

However, Judge Owen simply denied her motion and ordered her to go to trial. Her motion having been denied, Zagano was obliged to go to trial, "failing which involuntary dismissal for failure to prosecute [was] appropriate," *id.* at 57.

In sum, Zagano's refusal to proceed when the moment of truth arrived fully warranted dismissal of her case with prejudice.

Zagano, 900 F.2d at 15.

Since the question of dismissal with prejudice in response to a motion to dismiss without prejudice is not raised in this case, this Court could only render an impermissible advisory opinion.

II

THE CASE LACKS WIDESPREAD IMPACT OR NATIONAL IMPORTANCE

This case involves a routine exercise of judicial discretion following a thorough evaluation of Zagano's unique facts and circumstances in light of the well-established considerations which bear on whether a motion for voluntary discontinuance should be permitted under Fed. R. Civ. P. 41(a)(2). The outcome of the standard factual analysis in the circumstances of Zagano's particular case is of no consequence to any litigant other than Zagano herself. This Court should not squander its discretionary jurisdiction on a case, such as this, which lacks either widespread impact or national importance.

III

THE ISSUES RAISED BELOW WERE CORRECTLY DECIDED

Review is unwarranted in this case because the issues raised below were correctly decided.

A. Denial of Motion to Dismiss Without Prejudice

There can be no doubt that it is not an abuse of discretion to deny a motion to dismiss without prejudice where, as the court of appeals found here, (a) the motion was brought inexcusably late after the case had already been actively pending for over four years and a trial date had been set for seven weeks; (b) the defendants would be substantially prejudiced if the motion were granted; (c) the reasons given for the requested dismissal were inadequate; (d) the proposed alternative tribunal offered no cognizable advantages as a forum for resolving the controversy; and (e) there was evidence of vexatiousness and abuse of the litigation process on the part of the movant.

Indeed, to allow a voluntary dismissal in such circumstances would be to undermine Fed. R. Civ. P. 41(a)(2) which recognizes that once a case has advanced beyond the earliest stages, the interests of justice require that there be restrictions on a plaintiff's right to drop a case without prejudice. This case presented a model of the situation in which denial of a motion to dismiss without prejudice was required.

Significantly, not even Zagano goes so far as to contend that the facts here could not appropriately support an exercise of discretion refusing to allow a voluntary discontinuance. Instead, she contrives to distort the record by once again erroneously suggesting that the district court responded to her motion to dismiss without prejudice by precipitously dismissing her case on the merits and unfairly depriving her of an opportunity to have her claims heard in any forum. The record (A4a), however, leaves no doubt that Zagano's action was not dismissed with prejudice and on the merits until *after* her motion to dismiss had been denied and *after* she had been given the chance to present her case fully on the merits in the district court and *after* she had made clear, through her counsel, that she had no intention of ever proceeding in federal court.

B. Granting Motion to Dismiss with Prejudice

Authority to dismiss an action with prejudice under Fed. R. Civ. P. 41(b) "is vital to the efficient administration of judicial affairs and provides meaningful access for other litigants to overcrowded courts." *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 42 (2d Cir. 1982). In the face of the unequivocal stance of Zagano's counsel on the day of trial that Zagano would not proceed in federal court on that day or on any future day, there was no alternative but to dismiss the case on the merits under Fed. R Civ. P. 41(b) since, by that time, it had already been determined that a dismissal without prejudice would be unduly prejudicial to respondents.

This is not a case in which a blameless client was forced to pay a harsh penalty for a lawyer's shortcomings. As the district court concluded, it was Zagano's own "intransigence and irrationality" which caused the case to turn out as it did. *Zagano*, 720 F. Supp. at 268. Given the litigation strategy which Zagano adopted, the dismissal of her case on the merits was exactly what she should have expected.

C. Enjoining Further Litigation at the SDHR

If the SDHR proceedings had been permitted to continue following the federal court's dismissal of Zagano's Title VII action with prejudice and on the merits, Zagano would have achieved precisely what she had hoped to accomplish by her unsuccessful motion to dismiss without prejudice. She would have extricated herself from the federal court proceeding, at no cost to herself and at great cost to respondents, *and* remained free to pursue her claims in another forum just as if the federal action had never been brought. The district court's dismissal with prejudice would have meant nothing if Zagano had been permitted to try for a more favorable outcome before the SDHR. Zagano had her opportunity for her day in court, and she defiantly turned her back on it. It would have made a mockery of the federal court had Zagano been allowed to proceed in the SDHR as if a federal court

dismissal with prejudice and on the merits had no significance.

An injunction against further litigation by or on behalf of Zagano at the SDHR was necessary in order to effectuate and prevent the frustration of the district court's earlier order of dismissal of Zagano's action on the merits. Authority to issue such an injunction existed under the All Writs Act, 28 U.S.C. § 1651(a) (1983). Moreover, under Section 1651(a), the district court had the power to enjoin not only actions by a party to the pending federal court action, but also actions by a non-party, such as the SDHR, which was in a position to frustrate the implementation of a court order or the proper administration of justice. *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 174 (1977); *In re Baldwin-United Corp.*, 770 F.2d 328, 338 (2d Cir. 1985).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Dated: September 19, 1990

Respectfully submitted,

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